

ATTACHMENT "E"
CITY OF BRAWLEY - ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY APPLIED

The following is a discussion of the Enforcement Policy's administrative civil liability methodology applied to each of the violations alleged in Administrative Civil Liability Complaint R7-2013-0028. Violations of the CDO are non-discharge violations for purposes of applying the Enforcement Policy's administrative civil liability methodology and are subject to liability pursuant to Water Code section 13350.

Steps 1 & 2: Potential for Harm for Discharge Violations

Steps 1 and 2 apply only when a discharge is involved. Because the alleged pretreatment program violations for this Complaint, which relate to the Discharger's alleged failure to develop and implement a Pretreatment Program in accordance with the tasks and milestones specified in CDO R7-2008-0008, do not involve any discharges, Steps 1 and 2 do not apply.

Step 3: Per Day Assessments for Non-Discharge Violations

This factor is determined by a matrix analysis based upon the Potential for Harm and Deviation from Applicable Requirements.

- a. Potential for Harm is determined to be "major." The Enforcement Policy defines a "major" potential for harm as follows:

Major-The characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Additionally, non-discharge violations involving particularly sensitive habitats should be considered major.

Regional Board staff has gone out of its way to give the Discharger more than enough time than necessary to develop and implement a Pretreatment Program. As set forth in the ACL complaint, implementation of the Pretreatment Program is vital to reducing the high level of ammonia, TSS, BOD, and other constituents that are being discharged by the Discharger's single significant industrial user, National Beef, into the Discharger's WWTP. The Self-Monitoring Reports submitted pursuant to the Discharger's permit demonstrate that this inadequately treated industrial waste has caused or contributed to the Discharger's inability to consistently meet the final effluent limitations for these constituents. Although there have been no ammonia effluent limitation violations as a result of the Regional Board's adoption of interim effluent limits for ammonia, these limits were established only with the understanding and the Discharger's assurances that it would abide by the CDO and develop and implement a Pretreatment Program. But the Discharger's failure to timely develop and implement this Pretreatment Program has resulted in: (1) over 241 violations of the NPDES permit's effluent limitations for the other constituents of TSS and BOD; (2) a

WWTP that is running at or over design treatment capacity on a regular basis; and (3) a continuing threat from a POTW that does not have the treatment capacity to handle the solids from National Beef and its other industrial users. The net effect of the Discharger's failure to timely develop and implement its required Pretreatment Program is to compromise water quality for all residents of the City of Brawley by creating additional and unnecessary wear and tear on a facility, thereby diminishing the effectiveness of the systems utilized to handle overall treatment. In addition, even though these alleged Pretreatment Program violations do not directly involve a "discharge" per se, the particularly sensitive habitats into which this less effectively treated wastewater from the POTW discharges—here, the New River—is another factor that calls for categorizing the "potential for harm" as "major." The New River is well-known as one of the most polluted water bodies in the U.S. Adding inadequately treated pollutants and contaminants only exacerbates that serious water quality problem.

- b. The Deviation from Requirements is determined to be "major." The Enforcement Policy defines a "major" deviation from requirements as follows:

Major-The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).-

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- c. The Discharger has failed to develop and adopt local limits and achieve full compliance with an Approved Pretreatment Program. Even though the **wastewater treatment plant** has been operational for over six months and the Discharger's consultants have represented that the Discharger could have already developed local limits, the Discharger has refused to comply with the CDO's Pretreatment Program tasks and milestones. The milestones set in the CDO are now over three years overdue, but at no time did the Discharger ever request an extension or modification of any of the milestones or tasks. As a result, the CDO's Pretreatment Program requirements have been rendered completely ineffective. The Pretreatment Program has not been implemented, the Discharger continues to violate its WWTP's NPDES permit limits, and the Discharger continues to accept wastewater from its industrial users well beyond its WWTP's treatment capabilities, thereby causing its permit limits for BOD and TSS, to be exceeded and violated. The Enforcement Policy's Table 3 provides three factors to select from for potential for harm and deviation from requirements: 0.4, 0.55, and 0.7. Enforcement staff has concluded that the minimum level of **0.7** is appropriate as a conservative evaluation of a "major" potential for harm and a "major" deviation from requirements due to the Discharger's long-standing failure to comply with the Pretreatment Program requirements set forth in the CDO, and the overall high potential for harm to water quality as a result of that failure.

Initial Amount of Liability

For Violation of the CDO, the initial base liability amount is calculated as follows:

(Per Day Factor) X (Number Of Days Of Violation) X (Maximum Per Day Liability)
= Initial Base Liability

In this case, the amount calculated would be:

$(0.7) \times 1474 \text{ days } (2/15/09 - 2/28/13) \times (\$5,000/\text{day}) = \$5,159,000$

Step 4: Adjustment Factors—Violator's Conduct Factors

A. Adjustment for Violator's Culpability

For the violator's culpability factor, the Enforcement Policy suggests an adjustment resulting in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and the higher multiplier for intentional or negligent behavior.

The Discharger was aware of and should have been able to comply with the requirements of the development and implementation of the Pretreatment Program in accordance with the tasks and milestones set forth in the CDO. The Discharger's consultants stated that it would be able to develop local limits by February 15, 2009, the first milestone deadline the Discharger failed to meet, and the Discharger never contacted the Regional Board to request an extension of that deadline. The Discharger has continued to fine National Beef for violations of the NPDES permit's ammonia effluent limitations it is exempt from complying with and has provided no evidence that it has made any progress in implementing local limits. In the meantime, the Discharger has deposited the penalties collected in the General Fund and applied them to non-wastewater programs and costs, instead of using those penalties to develop and implement the Pretreatment Program. Based upon these circumstances, a culpability factor of **1.4** has been selected for Violation of the Pretreatment Program requirements of the CDO.

B. Adjustment for Cleanup and Cooperation

For this second adjustment factor—the violator's efforts to cleanup or cooperate with regulatory authorities after the violation—the Enforcement Policy suggests an adjustment multiplier range between 0.75 and 1.5. The Policy explains that a lower multiplier is appropriate for situations where there is a high degree of cleanup and/or cooperation and a higher multiplier is appropriate for situations where cleanup and/or cooperation is minimal or absent. In this case, a Cleanup and Cooperation multiplier adjustment factor of **1.1** is applied to the violation of the CDO's Pretreatment Program requirements.

For three years the Discharger has failed to develop or implement its Pretreatment Program; specifically, institution of its local limits and application to wastewater received from its industrial users. After continued follow-up by Regional Board staff, the Discharger has finally begun the process of developing local limits. However, based on past progress, Regional Board staff does not believe implementation will begin for some time. This is in part based on Regional Board staff's understanding of the process by which local limits will be implemented. Although Regional Board staff has begun to receive cooperation from the Discharger, the Discharger's three-year history of lackluster cooperation does not give Regional Board staff any assurance that the Discharger's future performance will be any different. Given that the Discharger knew it would not meet the deadlines set forth in the CDO, as evidenced by its inability to comply with the deadlines, Regional Board staff reasonably expected the Discharger to timely communicate its progress made, to request deadlines be revised as needed, and to make significant efforts to put in place and enforce local limits. None of that occurred.

C. Adjustment for History of Violations

The Enforcement Policy recommends that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used for this factor. In this case, a multiplier of **1.1** has been selected based upon a history of the Discharger's many prior violations.

Step 5: Determination of Total Base Liability Amount

Total Base Liability Amount is determined by multiplying the initial liability amounts for each violation calculated from Step 3 by the adjustment factors determined from Step 4:

(Initial Base Liability) x (Culpability) x (Cleanup/Cooperation) x (History) = Total Base Liability

Based upon the adjustment factors determined for Step 4, the Total Base Liability for Violation of the Pretreatment Program requirements specified in the CDO is calculated as follows:

$(\$5,159,000) \times (1.4) \times (1.1) \times (1.1) = \$8,739,346$

The adjusted Total Base Liability Amount established by the Enforcement Policy exceeds the statutory maximum liability amount. Therefore, the adjusted Total Base Liability Amount for violations of the CDO will be reduced to the statutory maximum liability amount of \$7,370,000.

Step 6: Ability to Pay and Ability to Continue in Business

The Enforcement Policy provides that if a regional water board has sufficient financial information to assess the violator's ability to pay the Total Base Liability, or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted.

In this case, Regional Board staff is aware of the fines totaling \$613,000, collected by the Discharger, which were recently transferred from its General Fund into a separate WWTP Fund. This amount does not represent the total fines the Discharger collected from the penalties it imposed on National Beef from 2009-2013, only the amount it transferred into the WWTP Fund. In addition, Regional Board staff is aware that the Discharger has additional monies from fines it collected that were not transferred and additional monies in its General Fund that could be used to pay any penalty. Finally, Regional Board staff is aware that the Discharger is continuing to collect fines from its industrial users.

Based on the above, Regional Board staff does not believe the proposed penalty to be assessed the Discharger will result in widespread hardship to the service population or undue hardship to the Discharger. Therefore, Regional Board staff has concluded that the Total Base Liability Amount should not be adjusted.

Step 7: Other Factors as Justice May Require

Staff time to investigate this matter and prepare the Administrative Civil Liability Complaint (ACLC) R7-2013-0028 and supporting information is estimated to be 420 hours. Based on an average cost to the State of \$150 per hour, the total cost is \$63,000.

Step 8: Economic Benefit

Please see memo dated February 28, 2013, from Gerald Horner, Office of Research, Planning and Performance

Step 9: Maximum and Minimum Liability Amounts for Violation of CDO

Please see ACL Complaint.